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PROCEEDINGS AND ORDERS DATE: 102885

CASE NBR 84-1-02032 CFY
SHORT TITLE Green, John B. DOCKETED: Jun 27 1985
VERSUS United States

Date	Proceedings and Orders
Jun 27 1985	Petition for writ of certiorari filed.
Aug 2 1985	Order extending time to file response to petition until September 3, 1985.
Sep 4 1985	Order further extending time to file response to petition until September 17, 1985.
Sep 18 1985	DISTRIBUTED. October 11, 1985
Sep 20 1985	Brief of respondent United States in opposition filed.
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	Petition DENIED. Dissenting opinion by Justice White, with whom Justice Brennan joins. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

84-2032

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JOHN B. GREEN
Petitioner

VS.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the opinion below erroneous under the Court's decisions last Term in *United States v. Yermian,* 468 U.S. ____, 104 S.Ct. 2936 (1984) and this Term in *Liparota v. United States,* ____ U.S. ____, 105 S.Ct. 2084(1985) or is there no *mens rea* which must be proven by the Government to support a conviction under 18 U.S.C. § 1001 or 18 U.S.C. § 1341?

2. Was Petitioner denied due process of law by the Government's failure to prove *mens rea* and by the failure of the District Court to instruct the jury on this subject?

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OCTOBER TERM, 1985

JOHN B. GREEN
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, John B. Green, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered, as amended, on January 14, 1985.

OPINION BELOW

The Court of Appeals opinion below is reported at 745 F.2d 1205 (9th Cir. 1984). The opinion is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1985. The petition for rehearing in the Court of Appeals was denied on April 30, 1985. The issuance of

the mandate of the Court of Appeals was stayed on May 29, 1984 pending this petition.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

1. United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty or property without due process of law;"

2. 18 U.S.C. § 1001 (false statements):

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 18 U.S.C. § 1341 (mail fraud):

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful

use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

4. Rule 29, Federal Rules of Criminal Procedure:

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

* * *

STATEMENT OF THE CASE

Petitioner has been convicted in the United States District Court for the Northern District of California on a charge that he willfully made a false statement to the Nuclear Regulatory Commission in violation of 18 U.S.C. § 1001, by submitting an altered test report concerning an epoxy coating to Bechtel, a private construction concern. The epoxy coating was applied by Bechtel's subcontractor to the inside of the chamber housing the reactor at a nuclear construction project at Hope Creek, New Jersey, a project at which Bechtel was employed as architectural and construction engineer by the owner of the prospective nuclear generating station, Public Service Electric and Gas, a public utility. Petitioner was also convicted on a charge of mail fraud in violation of § 1341 in connection with the submission of the altered test report to Bechtel. He has been sentenced to three years imprisonment and a six thousand dollar fine.

At his trial, however, the Government was not required to prove any *mens rea* in order to establish criminal liability for either offense. See, *Liparota v. United States,* ___ U.S. ___, 105 S.Ct. 2084 (1985); *Francis v. Franklin,* ___ U.S. ___, 105 S.Ct. 1965 (1985). Although Petitioner denied any "evil meaning mind", *Morissette v. United States,* 342 U.S. 246, 251 (1952), and testified, along with others, that the test report in question was altered at the specific request and insistence of Bechtel, all his requested instructions touching on the morally blameworthy elements of the offenses were refused.

Notwithstanding the District Court's acknowledgment that the evidence did not show Petitioner had "the usual criminal motive" (R.T. 606), the trial judge refused Petitioner's requested instructions on meaning of willfully as used in the statute, on any degree of jurisdiction knowledge under § 1001, on the distinction between intent

to deceive and intent to defraud, on the distinction between false and fraudulent statements, and on Petitioner's well supported defense of good faith expressly applicable to each type offense charged in the indictment. The jury instructions improvised and given by the trial judge failed completely to convey to the jury the requirement for a finding of *mens rea,* the "background assumption of our criminal law", *Liparota,* supra, 105 S.Ct. 2084, 2088, as a prerequisite to any finding of criminal liability. The instructions given by the District Court and those refused are reproduced in Appendix B to the petition.

The Court of Appeals affirmed. The Court conceded that " . . . there was some evidence of each of the points critical to Green's story", (Appendix A, p.), but held that the specific intent instruction given under § 1341 was adequate for all purposes. The Court of Appeals also held on first impression that *no* finding of any degree of knowledge of federal involvement was required under § 1001. See, *United States v. Yermian,* 468 U.S. ___, 104 S.Ct. 2936 (1984). The Court did not respond in its opinion to Petitioner's argument that he was constitutionally entitled to an instruction under each statute requiring the Government to prove that to act willfully means to act with the specific intent to do something the law forbids, with a purpose to either disobey or disregard the law (Appendix B, p. 5).

STATEMENT OF THE FACTS

Petitioner was a salaried employee of a small Los Angeles manufacturer of epoxy coatings. He was hired in 1977 as plant manager. That same year his corporate employer, Con/Chem, Inc., decided to test with Bechtel in order to qualify as a supplier of epoxy coatings to various Bechtel nuclear construction projects.

Under the direction of Albert Berger, Con/Chem's President, and James Meyer, the company's Executive Vice President, Con/Chem began the required Nuclear Regulatory Commission testing program in 1977. Mr. Meyer was in charge of the first test (N-108) done in October, 1977 as well as the subsequent tests (N-109 and N-110) which were performed throughout 1978. Meyer worked closely with Bechtel's representatives, Charles Graft and Val Pianka, in these 1977-1978 tests. All the tests were performed by the Oak Ridge National Laboratory, a division of Union Carbide, at Con/Chem's own expense. The test results were thereafter forwarded from the laboratory directly to Con/Chem for evaluation and later submission to Bechtel.

Meyer was instructed by Bechtel's representatives to evaluate the test results received from the laboratory himself and send only the passing test results to Bechtel. Under no circumstances was Meyer to send Bechtel any obvious failures. Of the first test results received from the laboratory Meyer forwarded approximately 25% of total test report (N-108) to Bechtel, which represented the passing results. Of the second test (N-109), Meyer again forwarded approximately 15% of the total test report to Bechtel, in keeping with Bechtel's instructions that it did not want its files to show any obvious test failures.

In 1978, after a year of testing and a number of tests at Oak Ridge, Bechtel's representative, Val Pianka, Bechtel's architectural project manager, told Meyer and Petitioner that Bechtel had decided to use the Con/Chem coating for Level I surfaces (safety related areas) at the Hope Creek project. Pianka also told Meyer and Petitioner that a written specification to this effect would be forthcoming. Later, in November, 1978, Bechtel released its written specification authorizing use of the Con/Chem

coating to its coating application subcontractors at the construction project.

In 1979, however, Val Pianka contacted Meyer with a personal appeal. Pianka asked Con/Chem to run one additional test for Bechtel to support Bechtel's November, 1978 specification and to provide further backup material and to complete Bechtel's files. Meyer refused, citing the expense involved in another test and the adequacy of the earlier tests for all purposes. Pianka stressed to Meyer the need to further support and document the specification and Bechtel's file. Pianka reassured Meyer and Petitioner that a decision to approve the coating had already been made by Bechtel. The additional test report, Pianka said, would not be relied upon by Bechtel but would be used only to make certain Bechtel's file was complete.

Meyer reluctantly agreed. In May, 1979, Meyer assigned the responsibility for the last test (N-111) and the title Quality Assurance Director to Petitioner. Since his employment at Con/Chem Petitioner had also worked as Meyer's helper in evaluating the pre-specification tests on the coating. He had no specific background for his new position, except the training he had received from Meyer and Bechtel's representatives in evaluating the pre-specification tests.

Meyer and Pianka both told Petitioner to make certain the last test report provided Bechtel with a report that satisfied Bechtel's need. Meyer told Petitioner that Con/Chem would pay for no more tests. Pianka told Petitioner that Bechtel knew the coating was acceptable and had been approved, but that Petitioner should take care to avoid causing any problems for Pianka with MQ&S, Bechtel's coatings review group. Petitioner understood that both his supervisor, Meyer, and Bechtel's representative, Pianka, did not want any test information

sent to MQ&S which would undercut Bechtel's November, 1978 specification.

In April, 1979, Petitioner was sent by Con/Chem to oversee the last test (N-111) at the laboratory in Tennessee. Due to an equipment failure at the laboratory, the N-111 test was botched and the coated samples almost destroyed. After the test results were received from Oak Ridge addressed to Meyer, Meyer gave them to Petitioner for evaluation and submission to Bechtel. Petitioner thereafter altered the last test report to delete the obvious failures and those results that went beyond the scope of the test, in order to satisfy Bechtel's request and his superior's instruction to him that the last test report show only positive results. This last test report was submitted to Bechtel in May, 1979.

In 1980, a discharged Con/Chem employee, Jake Dorian, filed an action against Con/Chem alleging he was wrongfully terminated for refusing to join a conspiracy to falsify reports to Bechtel and the Nuclear Regulatory Commission. Dorian sought one million dollars in damages. In connection with his lawsuit, Dorian approached the Federal Bureau of Investigation and reported that he had seen the N-111 test report as it lay open on Petitioner's desk at Con/Chem in 1979. He also described how the test report had been altered. After the FBI commenced its investigation, Bechtel in turn denied its earlier representations to Meyer and Petitioner regarding Bechtel's approval of the coating.

The indictment followed in San Francisco in 1983. Petitioner was charged with four counts of mail fraud (§ 1341) and one false statement count (§ 1001). After a jury trial in which he, Meyer, Pianka, and Dorian testified, Petitioner was convicted of one count of mail fraud. The jury either acquitted him or deadlocked on the remaining fraud counts. He was convicted of the false

official statement charge. Although there was no evidence presented at trial that Petitioner profited financially as a result of submitting the altered test to Bechtel, and although he had no prior criminal record of any kind and was otherwise an upstanding citizen, he was sentenced to a long term of imprisonment and a substantial fine.

REASONS FOR GRANTING THE WRIT

In its unprecedented judgment of affirmance the Ninth Circuit has abandoned the background assumption of our criminal law which requires proof of *mens rea* to support a criminal offense and subject an individual to the punishment of imprisonment. The Ninth Circuit has also ignored the longstanding rule of lenity in determining the ambit of criminal statutes. *Rewis v. United States,* 401 U.S. 808, 812 (1971). The decision below directly conflicts with the controlling decisions of this Court. *Liparota v. United States,* ___ U.S. ___, 105 S.Ct. 2084 (1985); *Francis v. Franklin,* ___, 105 S. Ct. 1965 (1985); *United States v. Yermian,* 468 U.S. ___, 104 S.Ct. 2936 (1984); *Sandstrom v. Montana,* 442 U.S. 510 (1979). This conflict alone is enough to warrant the grant of certiorari. But there are other reasons as well, which in combination justify the invocation of the Court's power to oversee the fair administration of criminal justice in the federal courts.

I.

THIS CASE PRESENTS THE QUESTION EXPLICITLY RESERVED LAST TERM IN *UNITED STATES* V. *YERMIAN,* 468 U.S. ___, 104 S.Ct. 2936 (1984) AND RAISES OTHER CONSTITUTIONAL QUESTIONS VITAL TO THE EFFECTIVE ENFORCEMENT OF FEDERAL CRIMINAL LAW.

This case presents again the substantial constitutional question concerning what *mens rea* must be proven by the

Government to support a violation under 18 U.S.C. § 1001. The question was recently reserved by the Court in *United States v. Yermian,* supra. It is squarely presented and decided adversely to Petitioner on this record. *United States v. Green,* 745 F.2d 1205, 1209-1210 (9th Cir. 1984) [Appendix A, pp. 7-10]. The Court of Appeals below held:

> (3) Jurisdictional knowledge
>
> Green argues that it was error for the district court not to have instructed on jurisdictional knowledge. He relies on our decision in *United States v. Yermian,* 708 F.2d 365 (9th Cir. 1983), rev'd, ____ U.S. ____, 104 S.Ct. 2936 (1984). In reversing this court, the Supreme Court specifically held that actual knowledge that a matter is within the jurisdiction of a federal agency is not required in order to establish a violation of section 1001. The Supreme Court found it unnecessary to decide, however, whether some other less culpable mental state must be proved with respect to federal agency jurisdiction. *Yermian,* ____ U.S. ____, 104 S.Ct. 2936 (1984).
>
> We are now squarely presented with the question reserved in *Yermian.* In deciding this matter of first impression, we have carefully reviewed the Supreme Court's decision in *Yermian* as well as the language and legislative history of section 1001. We are persuaded that no mental state is required with respect to federal involvement in order to establish a violation of section 1001." *Id.* pp. 7-8

Petitioner seeks a review of this decision of first impression since it may result in his imprisonment for acts which the record shows were committed without *notice* or knowledge that they were in violation of the law, the statutes or regulations. The constitutional correctness of

the opinion below is also of vital importance to the Government's effective enforcement of federal criminal statutes directed toward economic crime, and to the Government's power to regulate private conduct and private industry by the application of criminal statutes.

Petitioner believes that the Government must prove a *mens rea* with respect to each specific intent offense alleged in this case, including proof of some culpability with respect even to the jurisdictional element under § 1001. *Liparota v. United States,* 105 S.Ct. at 2092; *United States v. Yermian,* supra. Last term in *Yermian* the Court reasoned that the jury's finding that federal agency jurisdiction was reasonably foreseeable by the defendant, coupled with the jury's finding of the defendant's actual knowledge of the falsity, precluded the possibility that criminal penalties were imposed based on innocent conduct, and affirmed the conviction.

No such findings are possible on this record since, unlike Yermian's jury, Petitioner's jury received *no* instructions at all concerning culpability or the requirement for proof of *mens rea.* The evidence of *mens rea* was also insufficient and his Rule 29 motion should have been granted.

II.

THE DECISION BELOW CREATES A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS.

The decision below also creates a conflict between the Circuits over the availability of the traditional defense of good faith and the defendant's entitlement to an instruction on willfulness in a prosecution under 18 U.S.C. §§ 1341 or 1001. Now, in the Ninth Circuit, a defendant is no longer entitled to an instruction on willfulness or an

instruction on an adequately supported defense of good faith. *United States v. Green*, 745 F.2d 1205 (9th Cir. 1984); Cf. *United States v. Gering*, 716 F.2d 615 (9th Cir. 1983); Cf. *United States v. Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978).

However, were Petitioner indicted and tried in the Second, D.C., Fifth, Eighth or Tenth Circuit and presented sufficient evidence in support of his defense, he would have received an instruction concerning his defense and an instruction concerning *mens rea*, or willfulness. *United States v. Bronston*, 658 F.2d 920, 930 (2nd Cir. 1981), *cert. denied* 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979); *United States v. Fowler*, 735 F.2d 823, 828 (5th Cir. 1984); *United States v. Sherer*, 653 F.2d 334, 337 (8th Cir.), *cert. denied* 454 U.S. 1034 (1984); *United States v. Hopkins*, 716 F.2d 739, 749 (10th Cir. 1982), 744 F.2d 716 (*en banc* 1984). Courts in the Sixth Circuit would have also given the instructions Petitioner requested on the theory of the defendant's case and on willfulness. *United States v. McGuire*, 744 F.2d 1197 (6th Cir.), *cert. denied* ____ U.S. ____ (4/1/85).

Whether Appellant's constitutional right to trial by a jury adequately instructed on all the elements of the offenses and the applicable law, *Francis v. Franklin*, supra, is expressed in terms of a separate good faith instruction or in terms of the specific intent instruction, the intent to defraud instruction approved here was not sufficient because it failed to include any instruction on *mens rea* or willfulness. Compare, *United States v. Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978); compare, *United States v. Launder*, 743 F.2d 686 (9th Cir. 1985). Under the law of this case, a defendant intends to defraud if he makes a false or misleading statement regardless of whether he knows he is violating the law in making the

misleading statement, and regardless of whether he intends anyone to reasonably rely on the misleading statement to their detriment. *United States v. Green*, 745 F.2d 1205 (9th Cir. 1984); Cf. *Irwin v. United States*, 338 F.2d 772 (9th Cir. 1964); Cf. *Crocker Citizens National Bank v. Control Metals Corp.*, 566 F.2d 631, 636 (9th Cir. 1977); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980).

In the Second Circuit, however, the Government must prove that a defendant contemplated some actual harm or injury to the defrauded party in order to establish mail fraud. *United States v. Regents Office Supply*, 421 F.2d 1174 (2nd Cir. 1970); *United States v. Dixon*, 536 F.2d 1388 (2nd Cir. 1976); *United States v. Bronston*, 658 F.2d 920, 927 (2nd Cir. 1981), *cert. denied* 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982).

In the District of Columbia Circuit, the Government is required to prove in addition to an intent to deceive or mislead that the defendant contemplated some concrete harm to the defrauded party. *United States v. Lemire*, 720 F.2d at 1337 (D.C. Cir. 1983); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979). The same principle applies in the Fourth Circuit. *United States v. Mandel*, 415 F.Supp. 997, 1009 (D. Md. 1976). See also, *United States v. McGuire*, 744 F.2d 1197 (6th Cir.), *cert. denied* ____ U.S. ____ (4/1/85). In the Ninth Circuit, however, the mere making of a misleading statement not known to be in violation of the law and not intended to induce reliance or cause actual harm to others, which thereafter causes a use of the mails constitutes mail fraud in violation of § 1341. See, *United States v. Yermian*, ____ U.S. ____, 104 S.Ct. 2942 (1984) n. 12.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOHN B. GREEN,
Defendant-Appellant.
No. 83-1107
DC No. 83-0010-WWS

Appeal from the United States District Court
for the Northern District of California
William W Schwarzer, District Judge, Presiding

Argued November 16, 1983
Submitted September 10, 1984

Before: MERRILL, WALLACE, and SKOPIL, Circuit Judges

SKOPIL, Circuit Judge:

Green appeals his conviction on one count of mail fraud under 18 U.S.C. § 1341 and one count of filing a false official statement in violation of 18 U.S.C. § 1001. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellant John Green was the quality assurance director for Con-Chem, Inc. ("Con-Chem"), a Los Angeles manufacturer of chemical coatings. In 1978 Con-Chem attempted to secure a contract with Bechtel Power Corporation ("Bechtel") to supply coatings for use in the "Level I area" of nuclear power plant at Hope Creek, New Jersey. The Level I area consists of a chamber housing the reactor and cooling system and is a critical area of the nuclear plant from a safety standpoint.

In order for Con-Chem coatings to qualify for use in Level I areas they were required by the Nuclear Regulatory Commission ("NRC") to pass safety-related tests. Under the direction of Green, Con-Chem began a testing program to obtain approval for Level I use of its coatings.

Con-Chem's coatings performed poorly. Because testing indicated that Con-Chem materials were not suitable for Level I use, Green falsified the test report and delivered it to Bechtel. Later, Green sent Bechtel photographs which purportedly depicted tested samples. The samples in the photographs were actually new samples which had not been tested.

Several months later, a Con-Chem employee informed the FBI of Green's falsifications. Green was indicted on four counts of mail fraud and one count of making a false official statement. Prior to trial, the court dismissed Count Two on the government's motion.

The case was then tried to a jury. The jury was unable to reach a unanimous verdict on Count One. The court granted the government's motion to dismiss Count One. The jury convicted Green of Counts Three (mail fraud) and Five (false official statements). It found him not guilty of Count Four. Green was sentenced to three years' probation and fined $6,000.

ISSUES

1. Was there sufficient evidence to convict under 18 U.S.C. § 1341 and 18 U.S.C. § 1001?

2. Do the court's jury instructions require reversal?

DISCUSSION

1. Sufficiency of the Evidence.

A. Standard of Review

We must determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found Green guilty beyond a reasonable doubt of the essential elements of the offenses charged. *See United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982).

B. Evidence Under § 1341

(1) Intent to deceive

The government satisfies the requirement of proof of specific intent under section 1341 if it proves the existence of a scheme which was "reasonably calculated to deceive persons of ordinary prudence and comprehension," and this intention is shown by examining the scheme itself. *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (quoting *Irwin v. United States*, 338 F.2d 770, 773 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965)).

It was Green's primary line of defense at trial that he did not intend to deceive Bechtel, although he admits having altered the tests and faking the photographs. Green maintained that he believed Bechtel had already decided to use Con-Chem's coatings, that they would not rely on test reports for any purpose except to make their files complete, and that Bechtel wanted positive test reports even if they had to be falsified.

While there was some evidence which at least suggested each of the points critical to Green's story, there was evidence which discredited his defense and supported

the government's charges. The jury chose to believe the government's version of Green's intentions. There was sufficient evidence for them to do so.

(2) Furtherance of the fraud

The government must prove that the mailing which forms the basis for the fraud count was made for the purpose of executing the fraudulent scheme. *United States v. Price*, 623 F.2d 587, 593 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980).

Green argues that there is no evidence the mailing relied on for Count Three contributed to the success of any scheme. Green's argument borders on the frivolous. Bechtel, using the falsified report, approved Con-Chem coatings for the Hope Creek project and notified Con-Chem by mail. This mailing took place in June and is the mailing which forms the basis of Count Three. It clearly furthered execution of the fraud, since the whole purpose of the fraud was receipt of Bechtel's approval.

(3) Use of the mail

The June letter of approval from Bechtel to Con-Chem was placed in an outgoing mail basket at Bechtel. Green argues there was insufficient evidence to make the inference that the United States mail was actually utilized.

Direct proof of mailing is not required. *United States v. Brackenridge*, 590 F.2d 810, 811 (9th Cir.), *cert. denied*, 440 U.S. 985 (1979). Evidence of routine custom and practice can be sufficient to support the inference that something is mailed. *Id.*

The government presented testimony by a Bechtel employee that it was the routine at Bechtel for mail in the outgoing basket to be picked up and placed in the United

States mail. The evidence was sufficient for the jury to determine that the mail was used.

C. Evidence Under § 1001

(1) Materiality

The materiality requirement of section 1001 is satisfied if the statement is capable of influencing or affecting the federal agency. *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2436 (1983). The false statement need not have actually influenced the government agency.

The government presented evidence that the test report falsified by the defendant was one of the documents upon which the NRC might rely in determining whether to grant an operating license for a nuclear facility. There was sufficient evidence for the jury to conclude that Green's false statements were material.

(2) Jurisdiction

In order for a false statement to be punishable under section 1001, it must concern a matter within the jurisdiction of a department or agency of the United States. Under section 1001, the false statement need not be made directly to the government agency; it is only necessary that the statement relate to a matter in which a federal agency has power to act. *United States v. Balk*, 706 F.2d 1056, 1059 (9th Cir. 1983).

The test reports falsified by Green concerned materials to be used in a Level I area of a nuclear power plant. In order for these materials to qualify for use in Level I, they were required by NRC to pass safety-related tests. The jury could have concluded that Green's false statements related to a matter which was the concern of a federal agency.

2. **Jury Instructions.**

A. Standard of Review

Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the trial court's discretion. *United States v. Rohrer,* 708 F.2d 429 (9th Cir. 1983). Individual instructions must be viewed in the context of all instructions given. *United States v. Lee,* 589 F.2d 980, 985 (9th Cir.), *cert. denied,* 444 U.S. 969 (1979).

B. Merits

(1) Specific intent

The court instructed the jury on the mail fraud count that the government was required to prove beyond a reasonable doubt "that the defendant acted with the specific intention to defraud, that is, to deceive or mislead Bechtel in its selection or use of coatings, rather than as a result of ignorance, mistake, or accident."

Green contends that the court erred in failing to differentiate between intent to defraud and intent to deceive. He argues that intent to defraud, unlike intent to deceive, requires the intent to deprive someone of some right through deceit.

This court has at least twice approved descriptions of specific intent for mail fraud in terms of "deceit." *See Bohonus,* 628 F.2d at 1172 (specific intent proven if "scheme was reasonably calculated to *deceive* persons of ordinary prudence and comprehension") (emphasis added); *Irwin,* 338 F.2d at 773 (scheme to defraud is a "scheme reasonably calculated to deceive persons of ordinary prudence and comprehension") (emphasis added).

Even assuming that the defraud/deceit distinction is valid, the instruction was satisfactory. The context in

which the word deceit was used suggests depriving Bechtel of its right to make an informed choice among coatings.

(2) Good faith defense

Green argues it was an abuse of discretion for the court not to give an instruction on his good faith defense. A defendant is not entitled to a separate good faith instruction when the court gives an adequate instruction on specific intent. *See, e.g., United States v. Cusino,* 694 F.2d 185, 188 (9th Cir. 1982) (instruction on "specific intent to defraud can be deemed an instruction on good faith"), *cert. denied,* ____ U.S. ____, 103 S.Ct. 2096 (1983); *accord United States v. Gambler,* 662 F.2d 834, 837 (D.C. Cir. 1981). The instruction given on specific intent was thorough.

(3) Jurisdictional knowledge

Green argues that it was error for the district court not to have instructed on jurisdictional knowledge. He relies on our decision in *United States. v. Yermian,* 708 F.2d 365 (9th Cir. 1983), *rev'd,*____ U.S. ____, 104 S.Ct. 2936 (1984). In reversing this court, the Supreme Court specifically held that actual knowledge that a matter is within the jurisdiction of a federal agency is not required in order to establish a violation of section 1001. The Supreme Court found it unnecessary to decide, however, whether some other less culpable mental state must be proved with respect to federal agency jurisdiction. *Yermian,* ____U.S. ____, 104 S.Ct. 2936 (1984).

We are now squarely presented with the question reserved in *Yermian.* In deciding this matter of first impression, we have carefully reviewed the Supreme Court's decision in *Yermian* as well as the language and legislative history of section 1001. We are persuaded that no

mental state is required with respect to federal involvement in order to establish a violation of section 1001.

First, no mental state with respect to federal jurisdiction is evident from the language of section 1001. There are simply no adverbs or phrases modifying the jurisdictional requirement. As the Supreme Court observed in *Yermian:*

> [t]he statutory language requiring that knowingly false statements be made 'in any matter within the jurisdiction of any department or agency of the United States is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern.

Id. at ____, 104 S.Ct. at ____.

Second, the legislative history of section 1001 supports the conclusion that Congress did not intend to require jurisdictional knowledge. The original Act from which section 1001 is derived was narrowly drawn to proscribe false claims by military personnel against the government. Act of March 2, 1863, ch. 67, 12 Stat. 696. From 1863 until 1918, this original Act was subject to minor changes, including a revision making the Act applicable to "every person" and not just military personnel. Act of December 1, 1873, approved June 22, 1874.

In 1918, the Act was further revised and the false statement provision relevant to this discussion was added. Act of October 23, 1918, ch. 194, 40 Stat. 1015 (1918 Act). The 1918 Act was interpreted narrowly to proscribe only false statements made with intent to cause pecuniary or property loss to the federal government. *United States v. Cohn,* 270 U.S. 339 (1926). In so interpreting that statute the Supreme Court rejected the

government's contention that the 1918 Act should be construed broadly as prohibiting any interference with or obstruction of one of the government's functions by fraudulent means. *Id.* at 346.

In response to this narrow construction of the federal false statements statute, Congress undertook to amend that statute in 1934. The 1934 provision, which was eventually enacted into law, broadened the scope of the false statements statute by omitting the specific intent language. Act of June 18, 1934, ch. 587, 48 Stat. 996. Congress' purpose in amending the 1918 Act was to remove the prior limitation on the statute's coverage to cases involving pecuniary or property loss to the government and to extend the Act's coverage to those deceptive practices which might result in the frustration of authorized government functions. *United States v. Gilliland,* 312 U.S. 86, 93 (1941).

Finally, appellant argues that absent some state of mind requirement, section 1001 becomes a "trap for the unwary." To the contrary, the Court in *Yermian,* in response to this argument noted that "[i]n the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this court to amend the criminal statute," ____ U.S. ____, 104 S.Ct. at ____. The short response to appellant's concern that absent a culpability requirement section 1001 becomes a trap for the unwary therefore is simply that Congress intended to cut a broadcloth.

While we understand appellant's concerns, we observe that section 1001 explicitly incorporates certain limitations which guard against its being so highly penal as to be infirm. First, in order to be within the scope of section 1001, the false statement must involve a matter within

federal agency jurisdiction at the time it was made. Second, a person is guilty of violating section 1001 only if he "knowingly and willfully" makes a false statement. A person who knowingly and willfully makes a false statement cannot be deemed to have engaged in entirely innocent conduct. Finally, section 1001 has been construed as being applicable only to material misstatements or falsehoods. Duncan, 693 F.2d at 975; *United States v. Carrier,* 654 F.2d 559, 562 (9th Cir. 1981).

No culpable mental state must be proved with respect to federal agency jurisdiction in order to establish a violation of section 1001. The trial judge did not abuse his discretion in refusing to give an instruction on jurisdictional knowledge.

AFFIRMED.

APPENDIX B

I

(Instructions Given)

1. **Mail Fraud.**

"In Counts One, Three, and Four, the defendant is charged with violating the mail fraud statute, section 1341 of Title 18, United States Code. To establish this crime, the government must prove each of these three elements beyond a reasonable doubt:

First, that the defendant made up a scheme or plan to defraud someone. To defraud someone is to deceive or mislead him.

Second, that the defendant used the mails to carry out his scheme. The government does not have to show that Mr. Green himself mailed anything; it is enough that he did something which he knew or should have known would result in someone else using the mails. Each use of the mail is a separate crime.

Third, that the defendant acted with the specific intention to defraud, that is, to deceive or mislead Bechtel in its selection or use of coatings, rather than as a result of ignorance, mistake, or accident.

The government does not have to prove that the defendant gained anything from the scheme or that the scheme succeeded. Nor does the government have to prove that Bechtel acted in reliance on any representation that was part of the scheme; it is enough that a reasonable person in Bechtel's position might have found the representation important in deciding whether to use the Con Chem coating."

2. False Statement in a Matter Within the Jurisdiction of a Federal Agency.

"In Count Five, the defendant is charged with violating the false statement statute, section 1001 of Title 18, United States Code.

Mr. Green is charged with making a false statement in a matter within the jurisdiction of the Nuclear Regulatory Agency (NRC). To establish this crime, the government must prove each of the following five elements beyond a reasonable doubt:

First, that the defendant made a false statement;

Second, that the defendant knew the statement was false;

Third, that the defendant intended to deceive someone;

Fourth, that the defendant's statement was made in a matter within the jurisdiction of the NRC; and

Fifth, that the statement was material to the NRC.

A matter is within the jurisdiction of the NRC if the Commission has the power to act in that matter — for example, by granting or denying or suspending a license.

A statement is material if it could influence a decision of the NRC made in the course of discharging its functions under the law. The government does not have to show that the statement actually *did* influence the NRC, only that it could have."

II

(Instructions Refused)

DEFENDANT'S PROPOSED INSTRUCTION

NO. 2

COURT'S INSTRUCTION NO.____

Title 18, United States Code § 1341, provides in pertinent part as follows:

"Whoever, having devised any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme knowingly causes to be delivered by mail according to the direction thereon, any ... matter or thing, [shall be guilty of an offense against the United States]."

beyond a reasonable doubt in order to establish each offense under this statute as alleged in Counts One through Four of the indictment:

First: That the Defendant knowingly devised a scheme to defraud, by means of false and fraudulent pretenses and representations, as charged;

Second: That the Defendant knowingly caused any matter or thing to be sent and delivered by the United States Postal Service, for the purpose of carrying out some essential step in the execution of the scheme to defraud, as charged; and

Third: That the Defendant acted willfully, that is, with an intent to defraud Bechtel.

DEFENDANT'S PROPOSED INSTRUCTION

NO. 3

COURT'S INSTRUCTION NO. ____

A scheme to defraud includes any plan or course of action intended to deceive others and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement is false and fraudulent if it is untrue and known to be untrue when made, is made with an intent to defraud, and relates to a material fact. A material fact is a fact that would be significant or important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

To act "knowingly" means to act voluntarily and intentionally, and not because of mistake or accident.

To act "willfully" means to act voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with a purpose to either disobey or disregard the law.

DEFENDANT'S PROPOSED INSTRUCTION

NO. 4

COURT'S INSTRUCTION NO.____

You may not convict the defendant unless you find beyond a reasonable doubt that he intended to defraud Bechtel. To act with an intent to defraud means to act knowingly, with the specific intent to deceive and with the specific intent to induce reliance on the false statement, so as to deprive Bechtel of some right, property, or

interest by the false statement. Unless there is an intent to deceive and also an intent to induce reliance on the false statement, there is no fraudulent intent.

DEFENDANT'S PROPOSED INSTRUCTION

NO. 5

COURT'S INSTRUCTION NO.____

Title 18, United States Code § 1001, provides in pertinent part as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully makes any false . . . statements [shall be guilty on an offense against the United States.]"

There are three essential elements which must be proved beyond a reasonable doubt in order to establish an offense under this statute as alleged in Count Five of th e indictment:

> *First*: That the Defendant knowingly made a false statement in relation to a matter within the jurisdiction of a department or agency of the United States, as charged;
>
> *Second*: That the false statement related to a material matter, as charged, and;
>
> *Third*: That the Defendant acted willfully.

The making of a false statement is not an offense under Count Five unless the false statement was "material."

Under the facts of this case, the false statement alleged in the indictment would be a material statement if, and only if, it was calculated to induce action or reliance by

the Nuclear Regulatory Commission of the United States. In other words, it would be material only if it was capable of affecting or influencing the Nuclear Regulatory Commission's functions or its decisions.

DEFENDANT'S PROPOSED INSTRUCTION

NO. 6

COURT'S INSTRUCTION NO.____

Good faith is a defense available to a person charged with offenses in which, as here, specific intent is an essential element. A person who acts with an honest intention or on the basis of a belief honestly held is not chargeable with specific intent. This is true even though such opinion is erroneous, or the belief is mistaken. Evidence which establishes only that a person has made a mistake in judgment does not establish specific intent. What I have said respecting good faith as a defense is applicable to all the charges in the indictment.

So, if you find that the defendent honestly believed that Bechtel wanted test results of the coatings edited or tailored to delete obvious failures, and to show only passing results for Bechtel's files, and that the defendant honestly believed that Bechtel would not rely on the N-111 test results because Bechtel had already decided to accept the coatings for Level I use, then you should acquit the defendant.

OPPOSITION

BRIEF

No. 84-2032 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN B. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for mail fraud and making false official statements, the trial judge adequately instructed the jury on the element of intent.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 745 F.2d 1205.

JURISDICTION

The judgment of the court of appeals, as amended, was entered on January 14, 1985. A petition for rehearing was denied on April 30, 1985. The petition for a writ of certiorari was filed on June 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of making a false official statement, in

violation of 18 U.S.C. 1001; and on one count[1] of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of three years' probation and a $6,000 fine. The court of appeals affirmed.

1. The government's evidence at trial showed that in 1978 petitioner was the quality assurance director at Con-Chem, Inc., a Los Angeles company that developed and manufactured chemical coatings (Tr. 212, 357, 433). During that year, Con-Chem attempted to obtain a contract with Bechtel Power Corporation (Bechtel) to supply decontaminative coatings for use on the "Level 1" area of a nuclear power plant being constructed by Bechtel in New Hope Creek, New Jersey (Tr. 133-134, 186-187). Under guidelines promulgated by the Nuclear Regulatory Commission (NRC), coatings to be used in the Level 1 area of a nuclear facility, which consists of a chamber housing the nuclear reactor and cooling system, must pass several safety-related tests designed by the American National Standards Institute (ANSI) to ensure that any coating so employed will not peel or flake off the surfaces to which it is applied (Pet. App. A1; Tr. 146, 171-175, 268-271).

At the time Con-Chem decided to bid for the Level 1 coating contract, its product had not qualified for such use in accordance with NRC and ANSI standards (Tr. 186). Accordingly, under petitioner's supervision, Con-Chem conducted a series of tests to obtain the necessary Level 1 approval. As part of the test program, petitioner and his staff prepared a number of concrete blocks with coatings of Con-Chem materials which were then sent to the Oak Ridge National Laboratory (Tr. 252, 312-313). Con-Chem's products did poorly on the tests. Instead of adhering to the

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[1]Petitioner was initially charged on four counts of mail fraud. One of the counts was dismissed on the government's motion prior to trial, a second count was dismissed when the jury was unable to reach a verdict, and the jury acquitted petitioner on a third count (Pet. App. A2).

surface of the blocks when exposed to radiation, in many instances the coatings cracked, blistered, and lost their adhesion. The test results and sample blocks were returned by the laboratory to petitioner in April 1979 (Tr. 252, 315-316, 321; GX 6).

Realizing that the unfavorable test results might preclude Con-Chem from obtaining the contract with Bechtel, petitioner decided to falsify the test results (Tr. 418). He altered the test report by deleting references to cracking, blistering, and peeling and substituting in their place the phrase "coatings intact; no defects" (Tr. 418-445; GXs 4, 6). After altering the test results, petitioner met with the Bechtel staff assigned to evaluate the coatings, told them that Con-Chem's product had performed well on the tests, and delivered to them the falsified reports (Tr. 190-193). Shortly thereafter, he mailed to Bechtel photographs which purportedly depicted the tested sample blocks. In fact, the photographs were taken of blocks which had not been tested and which petitioner had spray-painted and substituted for the blocks damaged in the test (Tr. 337-338, 365-370).

Relying upon the falsified test results and photographs, Bechtel determined that some of Con-Chem's coatings qualified for Level 1 use at the New Hope Creek project under ANSI standards (Tr. 342-343). It therefore mailed a letter to petitioner on June 5, 1979, informing him of this, and a coating of Con-Chem's product was subsequently applied to the Level 1 containment area of the power plant (Tr. 198, 344-345; GX 8).

Several months later, a former Con-Chem employee who had observed petitioner spray-painting the untested blocks informed the FBI of the latter's activities (Tr. 365-372). When confronted by FBI agents with the falsified test results, petitioner initially denied involvement. Shortly after the interview, however, he admitted his actions to

Con-Chem's vice-president and attorney, informing the attorney that he had altered the test results to ensure that Con-Chem would be able to get into the nuclear business (Tr. 418, 422, 481, 496).

At trial, petitioner admitted altering the test results and fabricating the photographs submitted to Bechtel. He maintained, however, that in doing so he harbored no intent to deceive Bechtel (Tr. 482). To substantiate this claim, he attempted to show that, prior to submission of the test results, Bechtel had already decided to use Con-Chem's coatings, that he had been informed that Bechtel would not rely upon the test reports except to make its file complete, and that both his supervisor and Bechtel's project manager wanted a positive test report to be submitted to Bechtel even if it had to be falsified (Tr. 471-480). Despite this story, he was convicted.

2. On appeal, petitioner challenged the instructions given the jury.[2] He maintained that the instruction on the false statement count was deficient because it lacked any reference to his knowledge of whether his false statement — the report to Bechtel — was a matter within the jurisdiction of a federal agency. The court of appeals rejected this claim. After noting that, in *United States* v. *Yermian*, No. 83-346 (June 27, 1984), this Court found it unnecessary to decide whether some less culpable mental state than actual knowledge must be proven with respect to federal agency jurisdiction, it concluded that "no mental state is required with respect to federal involvement in order to establish a violation of section 1001" (Pet. App. A7-A8). In reaching this conclusion the court reviewed the language and legislative

[2]Petitioner also challenged the sufficiency of the evidence to convict him, but the court of appeals rejected this argument as well and petitioner does not press that issue to this Court (Pet. App. A3-A5).

history of Section 1001, and rejected defendant's claim that absent some state of mind requirement, the statute becomes a "trap for the unwary" (Pet. App. A8-A10).

Petitioner also claimed below that the instruction on the mail fraud count was defective because it failed to differentiate between intent to defraud, which he says implies intent to deprive someone of a right, and intent to deceive, which he says does not. The court of appeals rejected this claim as well, holding that even if petitioner's distinction were a valid one, in the context in which the term "deceive" was employed in the instruction, it properly conveyed the concept of intent to defraud (Pet. App. A6-A7). Finally, the court rejected petitioner's claim that the district court improperly omitted an instruction on good faith. It held that the concept was properly embraced within the instruction on specific intent (*id.* at A7).

ARGUMENT

Petitioner contends that this Court should grant certiorari because (1) this case raises a question reserved by this Court's decision last year in *United States* v. *Yermian*, *supra*, and (2) the Ninth Circuit's finding that the jury was adequately instructed regarding willfulness and good faith creates a conflict among the circuits.

1. Petitioner is correct in his assertion that this case presents a question reserved in *Yermian*: whether a culpable mental state (albeit short of actual knowledge) must be proved with respect to federal agency jurisdiction in order to establish a violation of 18 U.S.C. 1001.

But, obviously, this Court does not grant certiorari in a case simply because it presents an issue it has not yet decided. And there is no reason to do so in this case. Petitioner does not assert that any conflict among the circuits has yet developed on this issue. None may. This is especially so in light of the fact, discussed below, that the

Ninth Circuit's decision was demonstrably correct. The only other circuit to address this issue since this Court's decision in *Yermian*[3] has reached the same conclusion the Ninth Circuit did here. See *United States* v. *Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985); *United States* v. *Miller*, 742 F.2d 1279, 1286 (11th Cir. 1984), cert. denied, No. 84-1088 (Feb. 19, 1985).[4] And, as we also discuss below, this is in any event not the best case for addressing the issue, since petitioner did not request at trial the instruction he now says should have been given.

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[3]Prior to *Yermian*, three other circuits had also already reached the same conclusion as the court of appeals here. *United States* v. *Baker*, 626 F.2d 512 (5th Cir. 1980); *United States* v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Lewis*, 587 F.2d 854 (6th Cir. 1978) (per curiam). There is nothing in this Court's decision in *Yermian* that would cause them to overturn these rulings. See *United States* v. *Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985) (affirming the Eleventh Circuit's pre-*Yermian* rule and rejecting defendant's contention that *Yermian* "established by implication a constructive knowledge requirement"). Thus, the current tally has the Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits holding that Section 1001 requires no knowledge of federal jurisdiction; no court currently holds to the contrary. See also *United States* v. *Notarantonio*, 758 F.2d 777, 785 n.4 (1st Cir. 1985).

[4]The Court's recent decision in *Liparota* v. *United States*, No. 84-5108 (May 13, 1985), upon which petitioner relies (Pet. 11), is not to the contrary. In *Liparota*, the Court held that 7 U.S.C. 2024(b), which prohibits unauthorized use or possession of food stamps, required proof that the defendant knew that his conduct violated the statute or applicable agency regulations. The Court distinguished *Yermian* in *Liparota*, slip op. 12-13, pointing out, inter alia, that in *Yermian* some mens rea was already required as a non-jurisdictional element of the crime, which was not the case in *Liparota*. Moreover, in *Liparota* the "knowingly" requirement in the statute was, for grammatical and equitable reasons, less separable from the "jurisdiction" part of the statute (to the extent there was such a thing there). For instance, in *Liparota*, the "non-jurisdictional" part of the statute was not malum in se; in *Yermian* it was.

a. The holding of the court of appeals that there is no requirement of culpability with respect to federal jurisdiction under Section 1001 is correct. The language of the statute itself is enough. As this Court observed in *Yermian*, "Any natural reading of § 1001 * * * establishes that the terms 'knowingly and willfully' modify only the making of false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency." Slip op. 6 (footnote omitted). If "there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction" (*ibid.*), then there is likewise no basis for imposing some lesser requirement of scienter with respect to the element of jurisdiction. If the phrase "knowingly and willfully" does not modify the jurisdictional requirement, then *a fortiori* neither does a phrase not in the statute at all. "On its face, * * * § 1001 requires that the government prove that false statements were made knowingly and willfully" but "contains no language suggesting any additional element of intent * * *." *Ibid.*

Similarly, the Court's analysis in *Yermian* of the legislative history of Section 1001 and its precursors leads to the conclusion that the jurisdictional language in question was not intended by Congress to impose a requirement of scienter. In *United States* v. *Cohn*, 200 U.S. 339 (1926), an earlier version of the false statements statute was narrowly interpreted to proscribe only those false statements made with intent to cause pecuniary or property loss to the federal government. In 1934, responding to this narrow construction, Congress undertook to amend the statute. The provision eventually enacted into law broadened the scope of the false statement statute by omitting the specific intent language. In this regard, the statute, Act of June 18, 1934, ch. 587, 48 Stat. 996-997, provided:

> [W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make * * * any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined * * *.

As the Court observed in *Yermian*, slip op. 10, "[t]he jurisdictional language was added to the [legislation] solely to limit the reach of the false statements statute to matters of federal interest." If Congress, in amending the statute, had intended to impose a requirement of scienter with respect to the jurisdictional element, it plainly would have done so more directly.

Moreover, as the court of appeals here observed (Pet. App. A9), the congressional objective of the amending legislation was to extend the reach of the false statements statute "to those deceptive practices which might result in the frustration of authorized government functions. *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941)." Imposition of a requirement of some level of scienter with respect to the jurisdictional element would plainly be contrary to that objective. See *United States* v. *Feola*, 420 U.S. 671, 684 (1975). See also *Bryson* v. *United States*, 396 U.S. 64, 70 (1969) (jurisdiction "should not be given a narrow or technical meaning for the purposes of § 1001"). In furthering the purpose of protecting federal funds and functions from fraudulent interference, it is irrelevant whether a defendant should have known that his intentionally false statements might eventually influence a federal agency. See *United States* v. *Baker*, 626 F.2d at 516; see also *United States* v. *Stanford*, 589 F.2d at 297-298. This is especially compelling when the federal function interfered with is its regulation of nuclear power plants. But, more generally, requiring proof that a defendant should have known his false statement was in a matter within federal agency jurisdiction would narrow

significantly the scope of the protection provided by the statute for federal functions. In many cases, statements that are not made directly to a federal agency are elicited for the purpose of affecting government actions and are transmitted by their recipient to the federal government. For example, individuals submit applications to state, local, or private agencies in order to receive federal benefits or to secure federally funded contracts, or, as in *Yermian*, they submit information to a private defense contractor, which forwards it to the federal government for security clearance purposes. If such statements are false, they can cause serious harm to federal functions, quite without regard to whether the maker of the false statement claims ignorance of any federal connection.

This reading of Section 1001 is consistent with the purposes generally served by culpability requirements, on the one hand, and by jurisdictional language, on the other. In general, culpability requirements serve to distinguish blameworthy conduct from innocent conduct. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 252 (1952). But individuals who make statements they know to be false cannot claim plausibly that they believed they were engaging in innocent conduct. Compare *United States* v. *Freed*, 401 U.S. 601, 609 (1971). Like the respondent in *Feola*, the defendant here "[knew] from the very outset that his planned course of conduct [was] wrongful," 420 U.S. at 685. There is, therefore, no need for any additional culpability requirement.[5] The purpose of jurisdictional language in

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[5]Not all false statements that eventually find their way to the federal government constitute violations of Section 1001. In general, a false statement is "in a matter within the jurisdiction of a department or agency of the United States" only if the federal government has an "official and immediate" interest in the subject matter of the statement. See *Ogden* v. *United States*, 303 F.2d 724, 743 (9th Cir. 1962). Thus, if an individual gives false information to a neighbor, and the neighbor

most federal criminal statutes is confined to providing the basis for jurisdiction of the federal courts; such language does not normally double as a component of the mens rea required to violate the statutes.[6] In the great majority of cases, accordingly, the courts have held that, where a federal statute is silent with respect to any requirement that a defendant be aware of jurisdictional facts, proof of such knowledge is not an element of the government's case.[7]

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later communicates that information to a federal agency, there would be no Section 1001 violation, since the statement was not in a matter within agency jurisdiction at the time it was made. There is also, of course, a requirement of materiality. See, *e.g.*, *United States* v. *Notarantonio*, 758 F.2d 777 (1st Cir. 1985); *United States* v. *Duncan*, 693 F.2d 971 (9th Cir. 1982), cert. denied, 461 U.S. 961 (1983).

Finally, of course, even if judges may think that Congress has unwisely or unjustifiably laid a trap for the unwary liar, Congress alone has the power to disassemble it. *Yermian*, slip op. 11-12.

[6]Thus, the Senate Judiciary Committee explained in 1981 that the draft federal criminal code "states the general rule that proof of culpability is not required with respect to any factor which is solely a basis for Federal jurisdiction, for venue, or for grading. The rule is consistent with the trend of recent decisions interpreting existing criminal statutes, including both substantive offenses and conspiracy, as not requiring proof of *scienter* by a defendant as to the jurisdictional element contained therein." S. Rep. 97-307, 97th Cong., 1st Sess. 73 (1981) (footnote omitted). See also *Model Penal Code* § 1.13(10) (Proposed Official Draft 1962) ("material elements" for culpability purposes exclude jurisdiction and grading).

[7]In addition to *Feola*, see, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 847 (1973) (knowledge that checks were stolen from the mails, as opposed to knowledge that they were stolen, not required under 18 U.S.C. 1708); *United States* v. *Hamilton*, 726 F.2d 317, 319-320 (7th Cir. 1984) (knowledge of federal interest in converted funds not required under 18 U.S.C. 665); *United States* v. *Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (knowledge that individual is crossing state lines not required under federal kidnapping statute, 18 U.S.C. 1201); *United States* v. *Peskin*, 527 F.2d 71, 78 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976) (knowledge of use of interstate facilities not required under Travel Act, 18 U.S.C. 1952); *United States* v. *Hobson*, 519 F.2d 765, 769 (9th Cir.), cert. denied, 423 U.S. 931 (1975) (knowledge that the

In the aftermath of this Court's rejection of a requirement of actual knowledge in *Yermian*, the creation petitioner now seeks of another state of mind requirement would have

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escapee defendants aided had committed a federal crime and escaped from federal prison not required to establish that they were accessories after the fact under 18 U.S.C. 3); *United States* v. *Horton*, 503 F.2d 810, 813 (7th Cir. 1974) (knowledge that firearms had traveled in interstate commerce not required under 18 U.S.C. App. 1202(a)(1)); *United States* v. *White*, 451 F.2d 559 (6th Cir. 1971), cert. denied, 405 U.S. 1071 (1972) (knowledge that goods crossed state lines not required under 18 U.S.C. 2314); *United States* v. *Jennings*, 471 F.2d 1310, 1312 (2d Cir.), cert. denied, 411 U.S. 935 (1973) (knowledge that official bribed is a federal official not required under 18 U.S.C. 201(b)(1)); *United States* v. *Howey*, 427 F.2d 1017, 1018 (9th Cir. 1970) (knowledge of federal ownership of property not required under 18 U.S.C. 641); *United States* v. *Blassingame*, 427 F.2d 329, 330-331 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971) (knowledge that interstate communication is used not required under wire fraud statute, 18 U.S.C. 1343); *United States* v. *Licausi*, 413 F.2d 1118, 1121 (5th Cir. 1969), cert. denied, 396 U.S. 1006 (1970) (knowledge that money was stolen from federally insured bank not required under bank robbery statute, 18 U.S.C. 2113(c)); *Overton* v. *United States*, 405 F.2d 168, 169 (5th Cir. 1968) (knowledge of interstate transportation of stolen vehicle not required under 18 U.S.C. 2313); *Bibbins* v. *United States*, 400 F.2d 544 (9th Cir. 1968) (knowledge that automobile would cross state lines not required under 18 U.S.C. 2312); *United States* v. *Allegretti*, 340 F.2d 243, 247, modified on other grounds, 340 F.2d 254 (7th Cir. 1964), cert. denied, 381 U.S. 911 (1965) (knowledge that goods are stolen from an interstate shipment not required under 18 U.S.C. 659).

United States v. *Blassingame* provides a good example of the reasoning courts employ in concluding that the government need not prove a defendant's knowledge of facts supporting federal jurisdiction (427 F.2d at 330):

> The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire

to be "out of thin air." See *Yermian,* slip op. 9 (Rehnquist, J., dissenting). We note that petitioner does not even specify what that standard should be. The closest he comes is saying that there should be proof of "some culpability" (Pet. 11).[8]

b. Moreover, petitioner did not request at trial an instruction like the one he now seeks. Instead, he sought the instruction, later held to be unwarranted in *Yermian,* that the false statement alleged in the indictment is material "if and only if, it was calculated to induce action or reliance by the Nuclear Regulatory Commission" (Pet. App. B5-B6). Neither court below, therefore, had any occasion to consider in concrete form the propriety of an instruction requiring proof of some degree of culpability (which petitioner does not elaborate on) with respect to the jurisdictional element short of proof of actual knowledge. In fact, petitioner informed the trial court during a conference on the court's proposed instructions that "the only difficulty" he had with the court's instructions on Section 1001 pertained to "the definition of 'materiality' " (Tr. 513-514; see Pet. App. B2). Because petitioner failed to make a timely objection, his conviction under Section 1001 must be upheld

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employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication.

[8]Petitioner briefly alludes to the "rule of lenity" in the construction of criminal statutes (Pet. 11). But here, as in *Yermian,* the lack of ambiguity in the statutory language renders the principle inapplicable. *Yermian,* slip op. 6 (citing *McElroy* v. *United States,* 455 U.S. 642, 658 (1982); *United States* v. *Bramblett,* 348 U.S. 503, 509-510 (1955) (although "criminal statutes are to be construed strictly * * *, this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature")).

unless he establishes that the failure to instruct the jury on jurisdictional knowledge was plain error under Fed. R. Crim. P. 52(b).

In this case, the absence of such an instruction was not plain error since the direct and circumstantial evidence establishing petitioner's jurisdictional knowledge was strong and undisputed.[9] Unlike the defendant in *Yermian,* petitioner was not a lower-level company employee or job applicant, but was its quality assurance director (Tr. 357, 433, 467). As director, petitioner was in charge of the entire safety test program for Con-Chem's nuclear coatings (Tr. 311-313). He knew that the nuclear coatings which were the subject of his falsified safety test reports were to be used in the containment area of the New Hope Creek nuclear power plant (Tr. 487-488). Even apart from petitioner's position as quality assurance director at Con-Chem, there was direct evidence at trial establishing his knowledge that the quality and testing of Level 1 coatings were regulated by the NRC. The vice-president of Con-Chem testified that prior to directing this test program, petitioner had participated in other test programs in which Con-Chem tried to obtain Level 1 approval from Bechtel for its nuclear coatings. Petitioner assisted the vice-president in sorting through these past test reports and in preparing the reports for submission to Bechtel (Tr. 444-445, 472, 478-479), and these reports state on their face that Con-Chem's coating was being tested "[i]n accordance with * * * Federal Regulatory

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[9]See *United States* v. *Urbana,* 412 F.2d 1081, 1083 (5th Cir. 1969), cert. denied, 400 U.S. 821 (1970) (failure to instruct on elements of offense not plain error where identity was the only issue, defense counsel lodged no objection, and elements of the crime were not contested); *United States* v. *Schmidt,* 376 F.2d 751, 753 (4th Cir.), cert. denied, 389 U.S. 884 (1967) (same, though conviction reversed on other grounds); *Olar* v. *United States,* 391 F.2d 773, 775 (9th Cir. 1968) (failure to instruct on undisputed element of offense held harmless error).

Guide 1.54"—the regulation which adopts the ANSI test requirements for Level 1 coatings (Defense Exhs. F, G, and H). Petitioner's familiarity with these test reports further establishes his awareness of the fact that the federal government regulated the quality and testing of Level 1 coatings. Finally, in his testimony at trial, petitioner never denied knowledge that the NRC was responsible for ensuring that materials used in critical areas of nuclear facilities were safe (Tr. 471-497). Under these circumstances, no jury could have reasonably concluded that petitioner should not have foreseen that his false statements concerned a matter within the jurisdiction of the United States. If the failure of the trial court to give some sort of reasonable foreseeability instruction was error, it was therefore not plain, and indeed harmless.

2. Petitioner also claims (Pet. 11-13) that the courts below erred and created a conflict among the circuits in failing to require instructions on willfulness and good faith. But, in fact, the instructions given covered these points.

The jury was told that a conviction for mail fraud[10] requires proof of a "specific intention to defraud, that is, to deceive or mislead Bechtel in its selection or use of coatings, rather than as a result of ignorance, mistake or accident." It was also told that "[t]o defraud someone is to deceive or mislead him" (Pet. App. B1). It is not clear what petitioner

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[10]While at one point (Pet. 11) petitioner refers to Section 1001 as well as Section 1341, it appears that his contention regarding willfulness and good faith pertains principally to the latter. The court of appeals' opinion addressed these claims only with respect to the mail fraud count. In his brief below, petitioner raised these claims only with respect to that count, and here the petition concentrates its discussion on mail fraud (besides *Yermian* and the instant case none of the cases cited at Pet. 11-13 involves Section 1001 except *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980), which did not involve mens rea requirements for the false statement counts there).

finds lacking in these instructions. While any scheme to defraud inherently entails willfullness, that is not in fact an explicit statutory element in Section 1341. The mens rea specified for mail fraud is intent to defraud, and the instructions here require that to be found. The cases cited by petitioner (Pet. 11-13) require no more than this, and we are aware of none that do.

Similarly confusing is petitioner's contention (Pet. 12-13) that the instructions would allow convictions (1) where defendant does not know he is violating the law, or (2) where he did not intend anyone to rely on his statement, or (3) where he contemplated no actual harm to the defrauded party. But the instructions with regard to the mail fraud charge *did* require the jury to find that petitioner intended Bechtel to rely on his statements (Pet. App. B1), which obviates the latter two concerns, and there is no requirement that one who schemes to defraud have knowledge that a statute proscribes his inherently wrongful conduct.

Finally, since good faith is the obverse of an intent to defraud or deceive, the district court's instructions that the jury had to find that petitioner acted deliberately to deceive someone necessarily required it to consider petitioner's good faith theory. *United States* v. *Cusino*, 694 F.2d 185, 188 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *United States* v. *Rothman*, 567 F.2d 744, 752 (7th Cir. 1977); *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 71-72 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969). It is well established that in giving a required instruction the trial court has substantial latitude in the manner in which it is to be formulated and that the court is not bound to deliver it in the particular manner requested by the defense. See, *e.g.*, *United States* v. *Smith*, 735 F.2d 1196, 1198 (9th Cir.), cert. denied, No. 84-5629 (Dec. 3, 1984).

Moreover, in assessing the sufficiency of any jury instruction, the instruction at issue must "not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973) (citation omitted); see *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 11. Here, although the district court declined to give the proffered instruction in haec verba, it nonetheless gave petitioner everything to which he was entitled.[11]

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[11]The cases cited at Pet. 11-13 primarily stand for the proposition that a mail fraud defendant is entitled to an instruction embodying a mens rea element, which, as discussed above, petitioner got. One circuit, the Tenth, has held that a submission on the good faith defense as such must be given. *United States* v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc). Some Fifth Circuit cases are similar, though they stop short of the Tenth Circuit's more unequivocal rule. *United States* v. *Fowler*, 735 F.2d 823, 828-829 (5th Cir. 1984); *United States* v. *Curry*, 681 F.2d 406, 416-417 (5th Cir. 1982); *United States* v. *Goss*, 650 F.2d 1336, 1344-1345 (5th Cir. 1981). Petitioner does not specify this particular point as meriting this Court's review, however, apparently conceding that his rights would be safeguarded either "in terms of a separate good faith instruction or in terms of the specific intent instruction" (Pet. 12), the latter of which he got, as discussed *supra*. In any event, this narrow point certainly does not merit the Court's review. As a practical matter, it makes little difference whether the good faith defense is specifically labeled as such, since the other circuits are surely correct that good faith is simply the absence of willfulness and specific intent; as a consequence, there seems no likelihood that the manner of instructing juries on fraud and good faith (so long as fraud is correctly defined) could ever affect a verdict. It is for this reason that we did not seek certiorari in *Hopkins* despite the requirement it makes that other circuits do not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

SUPREME COURT OF THE UNITED STATES

JOHN B. GREEN *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–2032. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question of whether, in a prosecution for mail fraud under 18 U. S. C. § 1341, a defendant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue when the court gives a sufficient instruction on specific intent. Here, the United States Court of Appeals for the Ninth Circuit held that if a specific intent instruction adequately covers the issue of good faith, that is sufficient to present the defense to the jury, and the defendant is not entitled to a separate good faith instruction. Three other courts of appeals have reached the same conclusion. *United States* v. *Gambler*, 662 F. 2d 834, 837 (CADC 1981); *United States* v. *Bronston*, 658 F. 2d 920, 930 (CA2 1981), cert. denied, 456 U. S. 915 (1982); *United States* v. *Sherer*, 653 F. 2d 334, 337–338 (CA8), cert. denied, 454 U. S. 1034 (1981). Both the Fifth Circuit in *United States* v. *Fowler*, 735 F. 2d 823, 828 (CA5 1984) and the Tenth Circuit in *United States* v. *Hopkins*, 744 F. 2d 716, 718 (CA10 1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good faith defense, the trial court must give a separate instruction to the jury on this issue. See also *United States* v. *McGuire*, 744 F. 2d 1197, 1201 (CA6 1984). Given this square conflict among the courts of appeals, I would grant certiorari in this case.